IN RE ARBITRATION BETWEEN:

STOCK YARDS MEAT PACKING COMPANY

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 051216-50776-7

JEFFREY W. JACOBS

ARBITRATOR

June 9, 2006

IN RE ARBITRATION BETWEEN:

Stock Yards Meat Packing Company,

Employer,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 051216-50776-7
Weber grievance matter

Teamsters Local 120.

Union.

APPEARANCES:

FOR THE UNION:

Russ Platzek, Attorney for the Union
Martin Costello, Attorney for the Union
Larry Weber, grievant

FOR THE COMPANY:

Andrew Goldberg, Attorney for the Company
Michael Bitzan, Vice President of Human Resources
Doug Pasek, Transportation Manager

PRELIMINARY STATEMENT

The hearing in the above matter was held on April 5, 2006 in the offices of Hughes and Costello in St. Paul, Minnesota. The parties presented oral and documentary evidence at that time. The parties mailed post-hearing Briefs, dated May 19, 2006 at which point the record was closed.

ISSUES PRESENTED

Whether the Company had just cause to terminate the grievant under the facts and circumstances of this case. If not what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from September 1, 2003 to August 31, 2006. Article 10 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

COMPANY'S POSITION:

The Company argued that it had just cause to terminate the grievant since he had two consecutive no call no show days after only 9 months of employment. In support of these contentions the Company made the following arguments:

1. The grievant was employed as a delivery driver and had not had the job long before sustaining a work related knee injury on or about December 19, 2003. It does require, among other things, frequent lifting of objects weighing between 20 and 60 pounds. See, Company Exhibit 1.

2. The grievant injured his knee while delivering product to the Lexington Restaurant in St. Paul. This injury was covered under the Minnesota Workers Compensation Act. The grievant was allowed to treat with a doctor and to take time off work with appropriate workers compensation.

3. The grievant was released by his doctor to return to work without physical restrictions in May of 2004. In addition, the Company's workers compensation insurer had him see Dr. David Boxall for an independent medical exam. Dr. Boxall opined that the grievant was at maximum medical improvement as that term is defined by Minnesota law, that he had no further restrictions and did not need further medical treatment.

4. On July 21, 2004 the grievant informed his supervisors that he was going to take time off for surgery to his knee. This had not been approved by the workers compensation carrier and in fact was denied. That decision has thus far not been overturned by the Workers Compensation Courts.

5. The grievant was specifically informed that he would not be allowed to take time off and that he must report for duty. He failed to do so and did not call in to inform the Company of his whereabouts on July 28 and July 29, 2004.

6. The attendance policy, Company Exhibit 6, provides for termination for "job abandonment" for 2 consecutive no call no show days. It is undisputed that the grievant was directed to come to work on the dates in question and that he did not do so and did not call in to inform the Company where he was.

7. The Company further argued that the grievant clearly disobeyed a direct order to appear for work and that under the time honor concept of "obey now, grieve later" the grievant's resort to self help must be denied and his termination sustained. The grievant was fully aware of he procedure for obtaining a leave yet he chose to ignore those and essentially walk away from his job by failing to call in or to show up for work on July 28th and 29th.

8. The Company further argued that the grievant's credibility is highly suspect even his conduct and his statements in this matter. He did not even recall seeing Dr. Barron, whom he clearly had seen only a few months before the hearing. He further was not at all clear on the date on which he allegedly spoke to his supervisor about getting time off for the surgery. The company cited to several arbitration decisions for the proposition that credibility assessments should be made in favor of disinterested witnesses as opposed to the person whose very job is on the line.

9. The grievant was required to secure written permission for the leave under article 14 of the contract yet the grievant failed to do this despite having been specifically told he needed to in order to leave on the dates in questions. The grievant simply failed to follow the well established, reasonable procedures for obtaining time off and cannot now come back to claim that he either was not aware of them or was somehow prevented from exercising his rights under them

10. The Company argued too that it would be inappropriate to reinstate the grievant since physically he cannot do the job. The restrictions give to him by his own doctor do not allow the grievant to perform the essential functions of the job as set forth in Company Exhibit 1. Moreover, there are no clerical positions in the IBT #120 bargaining unit. Thus he shod not be given back his old position simply because he cannot physically do it any longer.

The Company seeks an award denying the grievance in its entirety and sustaining the discharge.

UNION'S POSITION:

The Union's position is that the Company did not have just cause to terminate the grievant and that he should be reinstated with full back pay and benefits. In support of this position the Company made the following contentions:

1. The Union's argument is simple: he was gone because he was having surgery on his knee to correct the work related problem caused by the injury sustained while working for this employer in December of 2003. The employee's doctor recommended it and recommended that he have it right away to prevent further injury or deterioration of his knee.

2. The Union further argued that it is simply disingenuous at best to say that the employer did not know where he was: he told them where he would be only a few days before. Thus this was not a no call no show situation at all. In fact it is really a dispute between the doctors as to the need for surgery and is essentially part of the ongoing workers compensation dispute between the employee and the employer and its insurer.

3. The Union further contends that the need for surgery was not a matter of choice but rather a matter of immediate medical necessity. The employee's doctor, a well-respected orthopedic surgeon, recommended surgery and the employee agreed in order to save his knee. Thus, it is not a situation where he employee had the choice to obey now or grieve later. Indeed, the Union contends, there is a well-regarded exception to that rule where to obey might well place the employee's safety at risk. If ever there were a situation that fit into that exception this would be it.

4. The Union also pointed to the opinions of Dr. Boxall as lacking medical or factual foundation. It is patently contrary to the subsequent opinions of Dr. Larry Stern, the employee's treating doctor, and Dr. Steve Barron, another independent doctor who examined the employee at the behest of another insurance company. Both doctors feel that the treatment had been reasonable and necessary and that the surgery performed was related to the work injury of December 2003.

5. The Union claimed that the employee in no way violated the Company's rules or the contract and that his absence was medically reasonable and necessary in order to correct the problems created by the December 2003 work injury. The Union pointed to Article 14, which provides in part that "Inability to work because of proven sickness or injury shall not result in loss of seniority rights." Moreover, Article 16 provides that "if an employee is notified to report for work and does not report or give satisfactory explanation for not reporting, he shall be considered as having voluntarily quit." The Union argued that there could no more satisfactory explanation for missing work than having surgery. The grievant's absence was clearly as the result of that and the employer knew it.

6. The Union further argued that under well established arbitral precedent, the notion of voluntarily quitting one's job denotes an intent to leave the job. Here the grievant came to the supervisors with the express intention of keeping his job and to notify that he would be gone a week in advance so they could make appropriate arrangements to cover his absence. He did not simply walk off the job, as many of the cases cited by the Company involve.

7. The Union countered the Company's argument that the grievant failed to follow procedures by failing to call in on the days he was gone. The Union argued that his supervisors had already told him that he would be terminated if he failed to appear. It was also clear that this statement was based entirely on the opinions of Dr. Boxall and the company's position that his knee surgery was not related to the work injury suffered at this employer. Thus a call in would have been futile.

8. The Union responded to the argument that the grievant can no longer perform his duty by pointing to the report of work ability dated January 9, 2006 in which Dr. Stern opined that the grievant is now capable of performing his full duties without restrictions. Thus there is no reason he cannot be reinstated to his former position.

9. The essence of the Union's argument is that the grievant did follow procedure and that his absence was for a demonstrated medical inability to perform his job. He did provide a satisfactory explanation for his absence and was well within the contractual language of Article 14 and 16.

Accordingly, the Union seeks an award of the arbitrator reinstating the grievant to his former position with all accrued back pay and contractual benefits.

DISCUSSION

The facts are relatively straightforward. The grievant worked as a driver for the Company and was required to lift and carry up to 60 pounds and to occasionally lift up to 95 pounds. It was by all accounts a physically demanding job. He injured his left knee on the job in December of 2003 when he slipped on some steps during a delivery in St. Paul. He was placed on physical restrictions due to the effects of this work related injury. The employer honored these. He treated with Dr Larry Stern who released the grievant to work without restrictions on May 5, 2004. The evidence showed however that the grievant was still having problems with his knee even after that even though he returned to work at full duty following this release.

By early summer of 2004 the grievant was having trouble with his knee and the medical record supports this. His doctor recommended surgery on his knee and this was scheduled for July 28, 2004. There was some dispute about whether this was truly necessary and whether the grievant pushed for this or not. The record as a whole supports the claim that the surgery was recommended by the doctor as a way to stave off further damage to the grievant's knee and to return him to a more functional life. The grievant agreed that surgery was appropriate and decided to proceed with it.

The insurance company for the company had him see another doctor, Dr. David Boxall, who rendered various opinions with respect to the knee injury. He first opined that on December 19, 2003 the grievant sustained a tear of the medial and lateral meniscus of his left knee and that this injury "was fully responsible for his subsequent time off work, need for treatment including the [first] surgery, and subsequent aspirations and cortisone injections in his left knee."

Dr. Boxall further opined however that these injuries were not responsible for the pseudogout of the grievant's left knee, which he felt was pre-existing. Dr. Boxall found that the grievant was managing well, had no swelling and further felt there was no indication for additional surgery. Dr. Boxall's report was dated May 27, 2004. See Employer Exhibit 8.

Dr. Stern however was of the opinion that the tears did need to be corrected and that Dr. Boxall's opinions were "unbelievable" given the nature of the injury and the status of the case. See, Employer Exhibit 13. Dr. Stern apparently did a repeat MRI scan and found a recurrent meniscal tear and recommended a repeat arthroscopic repair. This report is dated July 7, 2004, well after Dr. Boxall's report. The record as a whole supports the conclusions of Dr Stern in this matter. Clearly, this case is not about which medical opinion holds sway but is rather about whether there was just cause for the discharge of the grievant. These facts are discussed by way of background and as support for the claim that the Employer relied on Dr. Boxall's report at its peril by discharging the grievant for failure to appear for work when they knew well that he was having surgery t repair an injury that the employee's doctor felt was related to the work injury sustained at this employer.

The employer characterizes this case as very simple. It argued that the grievant was directed to come to work and he neither called nor appeared for work on the days he was directed to appear - ergo he should be fired. The employer is correct on one count: this is a simple case but the facts do not lead to the conclusion it seeks.

The Company pointed to its attendance policy as noted above as the basis for this action. The evidence however shows that the grievant did tell his supervisors where he would be and what he was doing. The record here amply supports the conclusion that the grievant in fact had surgery July 28th and was recovering on July 29th. He told the Company that. The record is absolutely clear that the grievant advised the Company where he would be ad what he would be doing on July 289th and that he did so at least a week in advance of that surgery. The record also shows that the employer did not offer any other sort of leave and simply told him to either appear for work or be fired.

The Company also raised the argument that he disobeyed a direct order to come to work. The grievant should have obeyed now and grieved later. The Company argued that the fact that he did not do so justified his termination. Two clear facts mitigate against this. First, the Union is correct that there is a widely accepted exception to the obey now grieve later rule. Where to obey would place the grievant in an unsafe position or subject him to injury the grievant may refuse to perform as directed. Here the record is absolutely clear that the grievant was well within his rights to refuse to come to work under these circumstances. While the Company's doctor indicated that there was essentially nothing wrong with the grievant and that he could return to work without restriction, a review of the medical records his that this opinion was without foundation in the record. As discussed more below, the record shows that the grievant needed surgery and that to come to work performing the lifting requirements found in the job description would have placed the grievant at significantly higher risk of injury not only to his knee but also to other body parts as well.

Second, the direction given to the grievant by his supervisors was based on the denial from the insurance company that this was not a work related matter. Dr. Stern did release the grievant to return to work in May of 2004 but it was clear that the grievant was still having problems with his left knee. More importantly, by July of 2004 the record shows that the grievant's knee condition had significantly worsened and that both he and his doctor felt that surgery was appropriate. Despite the Company's argument that the grievant somehow pushed this and "convinced" Dr. Stern to have perform the surgery, the evidence showed otherwise.

Dr. Stern recommended the surgery and the grievant agreed. It is axiomatic that a doctor can only make a recommendation and that the patient must agree with that. No one can be forced to have surgery and Dr. Stern 's medical record shows that he was not about to do an unnecessary surgery. The records thus show that surgery was necessary to cure and relieve the effects of the work injury and to prevent further injury.

Dr. Barron's opinion supports the conclusions of Dr. Stern as well. It is significant to note that Dr. Barron was also hired by another insurance company to render an pinion as to causation and appropriateness of the medical treatment, among other things. He both supported the treatment regimen of Dr. Stern and supported that this was caused by the December 2003 injury. While the insurer is entitled to rely on the opinions of its doctors under Minnesota law, they do so at the risk that other doctors and that the legal system will not so support them. Under those circumstances potential liability ensues. As noted below, this tribunal is not, f course to determine the compensability or non-compensability of the grievant's workers compensation claims. Indeed, those claims were not even litigated here. The medical documents were however presented and in order to determine whether there was just cause of the termination those were reviewed. Under these facts, it is clear that the opinion of Dr. Boxall must be rejected as without support on the factual and the medical record.

The Union properly points to various provisions of the collective bargaining agreement in support for its position in this matter. It is significant that the attendance policy is to some degree inconsistent with contract. The contractual provisions must prevail in this setting. Article 9 provides that "the employer shall; to discharge any employee without just cause and shall give the employee at least one warning notice of the complaint, in writing, to the employee affected and to the Union." Here no such notice was apparently given. The Employer's claim though is that the grievant abandoned his job by failure to call or appear for work for 2 consecutive days even though he had been specifically directed to appear for work.

Article 16 covers this situation almost exactly. It provides as follows: If an employee is notified to report for work and does not report or give satisfactory explanation for not reporting, he shall; be considered as having voluntarily quit." Here if course the grievant did give a satisfactory explanation for not reporting for work and he did so a week in advance. The evidence clearly shows that the grievant provide the necessary explanation to meet the requirements of this language.

Further, Article 14 provides that "inability to work because of proven sickness or injury shall not result in loss of seniority rights." Here the grievant met the burden of showing that his inability to work on the days in question was due to a proven injury. The Employer argued that r. Boxall's opinion against surgery should prevail. It doesn't on this record and the Employer's reliance on this report is done at its peril if the record does not support their doctor's opinions. Here the record provides ample support for the pinions of Dr. Stern. The grievant met his burden under article 14 as well.

The employer further argued that the grievant asked for and was denied the time off as workers compensation. He should therefore have requested the time under some other sort of leave. The record showed however that this would likely have been futile since he had not worked at this employer long enough to be considered for FMLA leave. More significantly, he as told quite directly that he would not be granted leave and that he was to report for work, surgery notwithstanding. See Employer's brief at page 5. It is not clear on this record what motivated this response or whether it was motivated by the pending workers compensation dispute or something else. It was clear however that the message to the grievant was to show up or else even though he has scheduled for surgery and told his supervisors that.

The employer further cited multiple arbitration awards in which it was determine that the grievants in those cases had abandoned their jobs. These are of course quite fact specific and do not bind the instant matter. In fact these cases were distinguishable on their affects and contractual language. The Company relied heavily on *Bethlehem Steel Johnstown Plant and USWA, Local 2635,* (Fishgold 1980) in which the arbitrator sustained the discharge of an employee who failed to show up for work and who did not provide an excuse in advance nor did he provide verification after he returned.

A cursory review of the case demonstrates its inapplicability to the instant dispute. The grievant there had been warned repeatedly about absenteeism and had been disciplined for it in the past. He had further been counseled to provide verification for the medical necessity for his absences in the event he would be absent. He was told to provide an excuse for work or to get it approved in advance.

On the dates in question, March 17 and 19, 1979, the grievant failed to do either and even though his mother had called in to report him sick he did not advise his supervisors of t the problem nor did he provide verification for his absence. The grievant had epilepsy and had been having seizure related problems.

The arbitrator noted that the question was not whether the grievant was capable of performing his duties but rather whether under these circumstances the Company was justified in discharging him because of his excessive absenteeism. The arbitrator noted that all he had to do was to get the absence approved in advance or bring in verification of the medical need for it afterwards. He did nether in that instance and the arbitrator sustained the discharge.

Here the case was quite different. The grievant notified the supervisors in advance of the need for surgery and when he would be gone. He also clearly provided verification of the need for his absence. The difference here is that this employer disagreed with the medical opinions of the grievant's doctor. Employers do that at their peril that upon examination, the medical opinions of the treating physical will be found to be credible and with adequate support as is the case here.

The simple fact is that the grievant did notify his employer of need for the absence and did not abandon his job. There is some merit to the Union's argument, and the caselaw it cited, for the proposition that job abandonment implies an intent to leave the job and simply walk away from it. Here the grievant's conduct was exactly the opposite. He certainly intended to continue on this job and told the Company that all along. More importantly, his conduct did not on this record arise to the level of a voluntary quit under Article 16.

The employer further argued that the grievant's testimony is tainted and must be rejected as not credible. The simple fact is that while there were some discrepancies in testimony between the grievant and Company witnesses, these discrepancies were minor and largely immaterial. The significant facts were those stated by the Company's witnesses anyway. They testified that the grievant told them he would be having surgery. They testified that they told him he was to report for work despite knowing that. They told him there was no other leave he could take ad that he would either have to show up or risk being fired. Finally they acknowledged and testified that the grievant told them about the surgery a week or more in advance of having it. The evidence thus established beyond doubt that the Company knew about the surgery and why he needed it. The grievant's credibility was not compromised in this matter nor was his testimony so dissimilar from that provided by the company that it affected the outcome. Accordingly, it is determined on the record as a whole that there was insufficient support for the termination of the grievant.

The next question is what remedy is to be imposed. Here the company's point is well taken. Under these circumstances, it would be inappropriate to reinstate the grievant to a position he was not able to perform during most of the pendency of his arbitration. While there was insufficient cause to terminate him, the record shows clearly that he was unable to perform the essential functions of the job. There is no basis in the contract to require the Company to create a light duty job for the grievant. Thus it is clear that the grievant would not have been able to return to work anyway even if the insurer had treated this as a workers compensable injury in July of 2004.

Back pay must thus be limited to the date on which he was medically cleared to return to work to his former position as a delivery driver. Contractual back pay is limited to January 9, 2006 until his reinstatement. While his wages may or may not be paid by workers compensation, depending upon the determination by the Workers Compensation Courts, the contractual benefits will not under any circumstances. The intent of this decision is to award full back pay and benefits from January 9, 2006 until his reinstatement.

Contractual benefits are a slightly different creature. The parties did not argue nor Brief the question of accrued contractual benefits as a part of the remedy. It has already been determined that there was insufficient evidentiary or contractual support for the grievant's termination but that due to the unique facts of this case, wage loss is limited as set forth above. Benefits are thus to be awarded to the extent they would have been paid even if the grievant had been out on workers compensation under r the terms of the contract between the parties. Thus, to the extent those benefits would have been available to him from the date of his termination he entitled to those benefits.

It should be noted that noting in this decision can or should be construed as having any impact, limitation or effect on the employee's claims for workers compensation under Minn. Stat. Ch. 176. Thos claims, if any, must be determined through the statutory system in place under Minnesota law.

AWARD

The grievance is SUSTAINED. The employer shall immediately reinstate the grievant to his former position with the Company and shall make him whole for all lost back pay and accrued contractual benefits from January 9, 2006 until his reinstatement. Further contractual benefits are awarded as appropriate as set forth above. The parties shall bear the costs of the arbitrator's fee equally as set forth in the statement attached to this Award.

Dated: June 9, 2006

_____

Jeffrey W. Jacobs, arbitrator